

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MATTHEW T. MOLITCH,
Plaintiff,

v.

BARBARA H. BROTMAN,
Defendant.

Civil Action
No. 96-7742

MEMORANDUM

Gawthrop, J.

July 14, 1997

Barbara H. Brotman, the defendant, moves to dismiss this diversity action for lack of subject-matter jurisdiction, that is, that the amount in controversy is insufficient; secondly she argues lack of ripeness, in that the underlying tax case, upon which liability is based at bar, has not yet run its course. See Fed.R.Civ.P. 12(b)(1). Upon the following reasoning, I shall deny the motion.

The parties married on June 9, 1957, and divorced, pursuant to a decree entered in the Superior Court of New Jersey, Camden County, on February 16, 1978. On March 20, 1987, the defendant petitioned the Montgomery County Court of Common Pleas to register the decree. On June 2, 1987, as part of what the plaintiff, Matthew T. Molitch, calls the Final Property Settlement Agreement ("Agreement"), the parties agreed orally in the state court that the plaintiff would have \$350,000 distributed from his profit sharing plan to the defendant as part

of a qualified domestic relations order, or QDRO. The defendant later realized that the Agreement could have significant tax consequences for her, unless she immediately rolled over the distribution into an individual retirement account. On January 7, 1988, the court of common pleas issued a QDRO that \$350,000 of the plaintiff's contributions to the Clark Transfer Profit Sharing Plan ("Plan") be distributed to the defendant.

On December 30, 1988, the defendant sued the present plaintiff and the trustee of the Plan in this court, contending that the state court's order did not constitute a valid QDRO. I granted summary judgment to the defendants in that action, holding that the order met the statutory definition of a QDRO. See Brotman v. Molitch, 1989 WL 88998 (E.D. Pa. Aug. 1, 1989). On December 16, 1991, I denied her motion for reconsideration.

The defendant then petitioned the United States Tax Court to declare the QDRO invalid, but the tax court held that this court's decision collaterally estopped the defendant from again challenging the validity of the QDRO. See Brotman v. Commissioner of Internal Revenue, 105 T.C. 141, 152 (1995). Nonetheless, it permitted her to challenge the plan's tax-exempt status. See id. at 155.

In February of 1995, the defendant allegedly urged the Internal Revenue Service to assess a deficiency against the plaintiff in connection with the distribution, which, the plaintiff contends, resulted in a tax assessment against him of

approximately \$250,000. He contests the Internal Revenue Service's assessment in the tax court, and maintains here that the defendant's efforts with the Service to have the tax burden shifted to him breached their Agreement of June 2, 1987.

The defendant contends that the plaintiff has not satisfied the amount-in-controversy requirement because he alleges damages that hinge on the tax court's ruling. That is, she argues that the plaintiff has not yet suffered damages from the alleged contractual breach, and that any damages that might flow from the alleged breach remain contingent on the tax court's yet-nascent decision. The plaintiff responds that the entire assessed deficiency of \$250,000 and the attorneys' fees he has incurred and will incur defending against the assessment stand as the amount in controversy.

The plaintiff has satisfied the amount-in-controversy requirement because the entire value of the possible consequences of this litigation well exceed \$50,000.¹ See Beacon Constr. Co., Inc. v. Matco Elec. Co., Inc., 521 F.2d 392, 399 (2d Cir. 1975). By their very nature, declaratory judgment actions involve injuries that have not occurred. The Internal Revenue Service has already asserted a deficiency against the plaintiff. He has avoided its payment only by challenging the assessment in the tax court. If, for example, he had challenged it in district court,

1. The jurisdictional threshold in diversity actions stood at \$50,000 at the time the plaintiff filed this action on November 20, 1996. 28 U.S.C. § 1332(a) (amended).

he would have had to have paid the sum. See McMillen v. U.S. Dep't of Treasury, 960 F.2d 187, 189 (1st Cir. 1991).²

If the parties contest a sum in excess of the jurisdictional threshold, the fact that future contingencies could prevent the damages from ever reaching the threshold does not deprive the federal court of jurisdiction. See Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464, 467 (1947). A probability that a finding of liability in another action would result in damages exceeding the jurisdictional threshold satisfies the amount-in-controversy requirement. See Sears, Roebuck & Co. v. American Mut. Liab. Ins. Co., 372 F.2d 435, 439 (7th Cir. 1967). The possibility that the other court might not find the federal plaintiff liable does not remove jurisdiction. See id. at 440 ("We hold this possibility is an insufficient reason for a district court's exercise of discretion to dismiss a suit for declaratory judgment"). I cannot say with legal certainty that the damages from the alleged breach could not exceed \$50,000. See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938).

2. The plaintiff also claims as damages the attorneys' fees he has incurred and continues to incur in the tax-court action. Some courts have permitted plaintiffs to recover attorneys' fees incurred in third-party actions. See Ingersoll Milling Machine Co. v. M/V Bodena, 829 F.2d 293, 309 (2d Cir. 1987) ("Where a breach of contract has caused a party to maintain a suit against a third person, courts have permitted recovery from the breaching party of counsel fees and other litigation expenses incurred in the suit").

The defendant next argues that, because the damages he asserts rest on the outcome of the proceeding in the tax court, the plaintiff's claim is not ripe, relying on Step-Saver Data Systems, Inc. v. Wyse Technology, 912 F.2d 643 (3d Cir. 1990). There, the court found a suit unripe because of contingencies regarding liability. The plaintiff replies that a substantial controversy of sufficient immediacy exists to warrant this declaratory judgment action.

A district court has the authority to grant declaratory relief if an "actual controversy" exists. Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 272 (1941). An actual controversy exists where the parties have adverse interests, the court has sufficient facts on which to make a conclusive judgment, and a judgment would clarify the parties' legal relationships. See Step-Saver, 912 F.3d at 647-649.

The parties have adverse interests because the plaintiff would suffer harm absent a declaratory judgment. See Travelers Ins. Co. v. Obusek, 72 F.3d 1148, 1154 (3d Cir. 1995). "[A] party need not decide between attempting to meet the nearly insurmountable burden of establishing that the relevant injury is a mathematical certainty to occur, nor must a party await actual injury before filing suit." Id. The parties contest whether the defendant has breached their Agreement of June 2, 1987. The threat of future harm from this alleged breach remains "real and substantial" because the Internal Revenue Service has assessed a

deficiency against the plaintiff. Salvation Army v. New Jersey Dep't of Community Affairs, 919 F.2d 183, 192 (3d Cir. 1990).

Because the events that could establish the defendant's liability have already occurred, this action would conclusively define the legal relationship between the parties. See Travelers, 72 F.3d at 1155. The plaintiff contends that the Agreement of June 2, 1987, placed the tax burden for the distribution of Plan contributions upon the defendant. He asserts that she breached the Agreement by urging the Internal Revenue Service to review his 1988 taxes and assess taxes for the distribution against him. The facts necessary to determine liability have all occurred. This action would settle the question whether the defendant's accomplished actions breached the parties' Agreement. The determination would not rest on hypothetical facts.

Additionally, a declaratory judgment would have utility because it would help the plaintiff "make responsible decisions about the future." Step-Saver, 912 F.2d at 649. The plaintiff could make different decisions about his challenge to the tax assessment depending whether he would have to bear the costs of the tax assessment alone. In other words, without the judgment, he might spend money that he otherwise would not. Thus, an actual controversy exists.

In Step-Saver, the claim lacked ripeness in part because liability, not damages, would remain contingent on future events even assuming the plaintiff obtained the declaratory

judgment sought. See Step-Saver, 912 F.2d at 648. The plaintiff there wanted a declaration that the defendants would have breached their contracts if other courts would later find that their negligence, as opposed to Step-Saver's negligence, had caused injuries to others. See id. at 647-48. The breach of contract, or the liability itself, depended on future events. Here, however, the plaintiff alleges that the defendant has already breached the contract, and the question before the court is who is liable for the breach of the contract. Only the extent of damages remains contingent. That is enough for the case to be ripe.

An order follows.

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ORDER

AND NOW, this day of July, 1997, for the reasons described in the accompanying memorandum, the defendant's Motion to Dismiss is DENIED. The stay of discovery is LIFTED.

BY THE COURT:

Robert S. Gawthrop, III, J.